IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. [redacted] 75

FORD MOTOR COMPANY,
Petitioner,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON and FRANK G. THOMPSON, As and Constituting the Department of Treasury of the State of Indiana,

Respondents.

BRIEF FOR THE RESPONDENTS OPPOSING THE PETITION FOR WRIT OF CERTIORARI

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No. 958

BRIEF FOR THE RESPONDENTS OPPOSING THE PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The United States District Court for the Southern District of Indiana, Indianapolis Division, delivered no opinion; its final decree is found at (R. 82). The opinion of the Circuit Court of Appeals of the United States for the Seventh Circuit (R. 98-103) is reported in 141 Fed. (2d) 24.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered on March 4, 1944 (R. 98). The Petition for a Writ of Certiorari was filed on May 3, 1944, and was served on respondents on May 4, 1944. The jurisdiction of this court rests on section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U.S.C.A. 347.

QUESTIONS PRESENTED

The petitioner manufactured and sold motor vehicles to dealers within the State of Indiana and was assessed for Indiana gross income tax upon the transactions. The petitioner paid such tax and now sues for a refund under the provisions of the taxing act. The questions are:

1. Whether the errors specified in the petition can be properly urged where they were not presented in the petition filed with respondents for refund as required by the statute.

2. Whether the receipts so taxed were taxable under a statute taxing the receipts of a non-resident from sources within Indiana, particularly under the decision of the Supreme Court of Indiana in *Department of Treasury v. International Harvester Company* (1943), 47 N.E. (2d) 150.*

3. Whether a decision by an employee of the Department, made during the pendency of this cause, constituted an account stated between the parties.

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* A copy of this decision is set forth as Appendix C, *post*, p. 31. As to Class C, D & E Sales, it was affirmed May 15, 1944 (12 U. S. Law Week, 4367), — U. S. —.

STATUTES INVOLVED

1. The first question above stated turns upon a construction of section 14(a) of the Indiana Gross Income Tax Law of 1933 as amended in 1937 which is set out in Appendix A, *infra*, pp. 26 to 28.

2. The second question presented, *supra*, involves taxes for the years 1935, 1936 and 1937. As to the first two years, this question involves a construction of section 2 of the Gross Income Tax Act of 1933 which is set out in Petitioner's Brief in Appendix A at page 28. As to 1937, the question involves an interpretation of such section 2 as amended in 1937, which amended section is set forth in Petitioner's Brief in Appendix A at pp. 29-30.

Incidental to the determination of this question, reference is made to the Uniform Sales Act as adopted in Indiana, the pertinent section being set out in Appendix B, *infra*, pp. 29-30.

STATEMENT

Upon petitioner's original (R. 2) and supplemental (R. 26) complaints and respondents' answers thereto (R. 11 and 31) the court stated its Findings of Fact (R. 41). The evidence in the cause has not been brought into the record (R. 90). Upon these Findings, the court stated its conclusions of law (R. 81) and rendered judgment for the respondents (R. 82) which judgment was affirmed by the Circuit Court of Appeals (R. 98-103).

The pertinent facts contained in the Findings of the court may be summarized as follows:

1. *This Litigation.*—On July 1, 1938, the respondent, Department of Treasury of the State of Indiana, pursuant

to the Indiana Gross Income Tax Act made a proposed assessment upon the petitioner (R. 63). After due protest (R. 65) and final assessment (R. 65) petitioner paid such assessment (R. 65). Within the time and under the procedure specified by section 14 of the Indiana Gross Income Tax Act (Appendix A, *infra*, p. 28) petitioner filed with respondents a petition for refund of the taxes so paid (R. 66), which petition was in proper form (R. 68) and in which petition petitioner specifically stated the reasons for its such claim as follows (R. 66):

> "(1st) That the receipts were from commerce between the states, and under Section 8, Article I of the Constitution of the United States, the tax was void;
>
> "(2) That the receipts were from transactions completed outside of the State and were not taxable under Section 1 (m) of the Gross Income Tax Act as amended, nor under Regs. 191 and 193 under the 1933 Act, and further, if such receipts were taxable, then the Act was in conflict with the Fourteenth Amendment to the Constitution of the United States;
>
> "(3rd) All of the tax assessed on Class A sales for the year 1935 and that portion of tax for the year 1936 collected for the first three quarters was not assessed 'at any time within two years after the time when the return covering such gross income was filed, and after due notice by registered letter, to the taxpayer,' and such assessment for the aforesaid periods was therefore void. Plaintiff's refund petition also set forth as Exhibits schedules demonstrating certain errors in the original audit figures of the figures of the defendants which were attached to the notice of proposed assessment of July 1, 1938."

Thereafter, on June 7, 1939, petitioner filed its complaint in this cause for such refund. The complaint alleged the above facts and after alleging the method by which it did business stated as its grounds for recovery in regard to Class A sales (R. 7-8) that the taxation of such receipts was prohibited by the commerce clause of the Constitution of the United States; that such receipts were derived from activities, business and sources outside the State of Indiana under the provisions of section 2 of the Gross Income Tax Act of 1933 and as amended in 1937; and that if construed to be taxable under the Gross Income Tax Act then the Act is in violation of the Fourteenth Amendment of the Constitution of the United States. To this complaint the respondents addressed an answer of admission and denial (R. 11-35).

On October 27, 1941, the petitioner filed an amendment of and supplement to their complaint, amending Paragraph I of their complaint in one particular (R. 26-27) and adding a second paragraph of complaint (R. 27-30) which second paragraph alleged that after the filing of this cause the parties agreed to a review of the decision upon the claim for refund theretofore filed, and that for that purpose petitioner filed with the respondents a request for reconsideration and that respondents acquiesced in such request for reconsideration and upon reconsideration agreed with the petitioner that the transactions taxed were not taxable and notified petitioner that the claim for refund had been allowed; that petitioner acquiesced in such allowance and ruling and that by reason of such allowance and acquiescence an account was stated between the parties. To this amended and supplemental complaint the respondents filed answer (R. 31-39) denying any account stated and setting

up additional facts concerning the negotiations between the parties.

The cause was referred to a special master (R. 40) who made report which was adopted by the court as its Findings of Fact (R. 40).

2. *The Contract between the Petitioner and Its Dealers in General.*—Each dealer to whom the petitioner sells its products enters into a contract with the petitioner the form of which is set forth in the Findings of Fact (R. 43-49). By this contract the petitioner agrees to sell and the dealer agrees to purchase petitioner's products F.O.B. Detroit, Michigan, at the prices from time to time determined by the company. Sales are to be upon a cash basis only and it is expressly provided that full payment precede delivery (Clause 2, R. 44), and that title remain in petitioner until the price is paid (Clause 6, R. 45). In addition to the payments specified, the company is permitted to add an amount determined by it for freight, packaging and other handling expense and any taxes imposed by the dealer's state (R. 44). The dealer agrees to comply with the company's requirements in the operation of its business and its method of selling to the consumer. The method of ordering is specified (R. 46-47), provision is made for termination (R. 47-48), construction of the contract is to be by the law of Michigan (R. 48), assignment without consent is forbidden (R. 48), modification variance or cancellation is prohibited except by instrument in writing executed by certain executive officers of the petitioner (R. 48), and it is agreed that the contract states the full agreement between the parties (R. 48).

3. *Specific Provisions of the Contract upon Which Respondents Rely.*—The contract (Clause 2, R. 44) specifically provides:

"Payment by dealer is to be in cash before delivery, or by paying sight draft attached to Bill of Lading, including exchange."

The contract further provides (Clause 6, R. 45):

"Title to all company products until actually paid for by dealer shall be and remain in company; but regardless of title remaining in company or having passed to dealer all shipment shall be at dealer's risk from the time of delivery to carrier at place of shipment; * * *

Clause 9 (h) provides (R. 48):

"The terms of this agreement may not be enlarged, varied, modified or cancelled by any agent or representative of company, except by an instrument in writing executed by the President, Vice-President, Secretary or Assistant Secretary of company and company will not be bound by any alleged enlargement, variation, modifications, or agreement not so evidenced."

4. *Petitioner's Manufacturing and Sales Organizations.*—Petitioner is a Delaware corporation (R. 41). It is engaged in the business of manufacturing motor vehicles with a plant and principal place of business at Dearborn, Michigan, and assembly plants *inter alia* at Chicago, Illinois, Cincinnati, Ohio, and Louisville, Kentucky (R. 42). The plant at Dearborn, Michigan, manufactures the parts *i. e.* motors, chassis, wheels, fenders, bodies, etc., which are then shipped to the assembly plants (one assembly plant is also maintained at Dearborn) where manufacture of the motor vehicle is completed by the assembling, painting and processing of these parts (R. 61).

The assembly plants also operated as regional sales agencies with territories that in the instant case overlap state boundaries. No assembly plant is located in Indiana (R. 42, 43), but petitioner maintains at Indianapolis a branch for storage and distribution, this branch being allotted a territory in the central part of Indiana, the remainder of the state being divided among the out-of-state assembly plants (R. 49-50).

5. *Method of Ordering.*—The dealers place a preliminary order with the branch to which they are assigned, by mail, by the tenth of each month. From these orders petitioner makes up production schedules, allots the units and prepares shipping schedules (R. 50-51).

Dealer's order contains a detailed specification of the type of vehicle, color, body, upholstery, and special equipment and the units are manufactured specifically according to such orders at the assembly plant (R. 50-51).

6. *Delivery of the Units.*—When manufacture has been completed at the assembly plant and the unit tested and checked against the invoice it is delivered to the dealer or a carrier at the gate of the assembly plant (R. 52). The Class A sales here involved were all delivered to the truckaway companies and none were delivered to the dealer (R. 63-64). The employees of the truckaway company signed the invoice as agent of the dealer without specific authority but as a matter of custom known to the dealer (R. 52-53).

7. *Payment by the Dealers.*—In regard to Class A sales the dealer paid the purchase price to the truckaway company in cash upon delivery by the truckaway company at the dealer's place of business in Indiana; or by executing finance papers to a finance company, where by pre-

arrangement the finance company agreed to pay the petitioner the cash represented by such finance papers; or by a combination of cash and finance papers. All such cash and finance papers were delivered to the truckaway company at the dealer's place of business in Indiana and were delivered by them to the petitioner at its out-of-state assembly plants (R. 63-64).

The finance papers are in the form of trust receipts reciting that a security interest has passed to the finance company (R. 54). Both the truckaway and finance companies were independent of the petitioner and the dealers. The truckaway companies were contract carriers until 1937 and common carriers thereafter.

8. *Retention of Control during Shipment.*—The petitioner exercised its right of title and possession during shipment by diverting deliveries a great many times, during the entire course of assembly and shipment and up to the time of final payment by and delivery to the dealer at his place of business in Indiana (R. 57-58). In such instances, the petitioner would direct delivery to another dealer even during or at the termination of transit and would re-bill the unit to such other dealer.

9. *Ultimate Facts Stated by the Court.*—Upon these facts the court stated the ultimate facts that these units were delivered by petitioner to its Indiana dealers in the State of Indiana (Finding 17, R. 78); that the truckaway companies acted as agents of the dealers where they signed finance papers on their behalf; as agents of the petitioner in transmitting collections from the dealers to petitioner; and as carriers in the transportation of the goods, and that the receipts from such sales were derived from sources in Indiana from the sale and transfer of the goods which were delivered to the purchaser in Indiana.

10. *The Facts Concerning the Account Stated.*—While this cause was pending in the trial court pursuant to conversations between counsel, petitioner requested a rehearing upon its petition for refund theretofore filed with the respondents (R. 68). Pursuant to such request counsel and one, Elmer F. Marchino, an employee of respondents, designated as a hearing judge to hear such matters, made a further investigation of the facts (R. 69) and pursuant to such request for a re-hearing and the investigation thereon the Hearing Judge executed and mailed to petitioner a letter which appears on pages 73-75 of the record and which may be summarized as follows: It is stated that the request for reconsideration was based upon the contention of the petitioner that the transaction concerning the sale of petitioner's motor vehicles,

> "At points outside of the State of Indiana and there delivered to Indiana customers within the territorial limits of that outside branch or assembly plant constituted a transaction completed in its entirety outside of the State of Indiana and thus did not fall within the purview of the Gross Income Tax Act."

The facts upon which the decision was made are stated to be that the Indiana dealers or their authorized agents take delivery at the out-of-state assembly plant under conditions whereby petitioner at the time of delivery is paid for the products either in cash or by appropriate financing and does not have the obligation or responsibility to make delivery into Indiana or to initiate the transportation into Indiana, but on the contrary that petitioner's entire responsibility ceases at the time of delivery of the products at the assembly plant outside the state.

It was then held that *such transactions* are completed at a business situs entirely outside of the State of Indiana and are not transactions in interstate commerce and that a refund will be made thereon.

Following this decision various conversations and negotiations were had between counsel, court and employees of the Department and, pursuant to the directions in the decision that the Department take the necessary steps to make refund, an audit was made by the respondent (R. 77) by which audit the Department found that the transactions mentioned in the decision amounted to $10,267.45 upon which petitioner was entitled to a refund of $25.67 which was paid and accepted without prejudice to the rights of the parties (R. 77, Finding 14).

Upon these facts the court made the ultimate finding that respondent did not at any time promise to refund $78,514.10 (being the tax on *all* Class A sales) or any other specifically stated amount, and that no certificate of over-assessment was ever issued by respondents (R. 77, Finding 15).

11. *Conclusions of Law.*—Upon these facts the court concluded *inter alia* that no account stated arose between petitioner and respondents, that the tax assessed and collected under Class A transactions is not prohibited by the Constitution of the United States and was lawfully assessed and collected and that the law is with the respondents and against the petitioner (R. 81).

12. *Decision of the Circuit Court of Appeals.*—This cause being submitted to the Circuit Court of Appeals solely upon errors arising out of the court's conclusions of law (R. 98), the court quoted the Findings of Fact referring particularly to Class A sales (being Finding No. 10,

R. 63, and Finding 17 (B), R. 79-80), and held that from these Findings it is clear that all transactions in Class A sales took place in Indiana except the manufacture, assembling, and shipment of the goods and the receipt of some orders and distinguished *Department of Treasury v. International Harvester Company*, 47 N. E. (2d) 150, upon the ground that in the Class A sales in that case the articles were accepted and paid for outside of Indiana, while in the case at bar they were accepted and paid for in Indiana (R. 101). To this conclusion Lindley, D. J., dissented.

The court further held that no account stated arose between the parties. In this regard the opinion was unanimous.

SUMMARY OF ARGUMENT

A.

The Indiana Gross Income Tax Act requires, as a condition precedent to this statutory action for a refund, that the petitioner shall have filed a petition with respondent for such refund stating the reasons for its claim. The petitioner did not include the grounds of the petition for a writ of certiorari as reasons in its petition for a refund. Therefore it cannot assert such grounds in this court.

B.

The law of Indiana, particularly as expressed in *Department of Treasury* v. *International Harvester Company* (1943), 47 N.E. (2d) 150, is that receipts received from the sale of goods are received from a source within the state, if the property in the goods passes to the buyer within the state. In the case at bar petitioner, by contract, expressly postponed delivery and transfer of title until

full payment was received from the buyer. Petitioner exercised control over the goods during shipment by diverting deliveries a great many times and by permitting the buyer to refuse delivery. Under the law of Indiana the property in the goods did not pass to the buyer under these circumstances, until the goods were received and paid for by the buyer within the state. The receipts were, therefore, received from a source within Indiana and were taxable under section 2 of the Gross Income Tax Law.

No Constitutional or Federal questions are presented.

C.

The Circuit Court of Appeals correctly stated the facts and no cause is shown for the exercise of the supervisory power of this court.

D.

The alleged account stated claimed by petitioner is predicated upon an opinion written by a hearing judge who has no statutory authority. On the contrary the law specifically provides that no document shall constitute the official act of the Department unless it is signed by the Director. The authority of public officials in Indiana is limited to that conferred by law. Therefore, no valid assent was given by the Department to any account stated.

If the Letter of Findings be construed as the act of the Department yet the finding was expressly limited to those instances where full payment was received by petitioner outside of the state at the time of delivery. Subsequent to the issuance of this opinion an audit was made by the respondent of the sales so described in the opinion and the erroneous tax disclosed by such audit was refunded to the petitioner.

ARGUMENT

A.

The Specifications of Error stated in the Petition for Certiorari are based upon grounds not stated in Petitioner's Claim for Refund and cannot be urged in this action.

The Indiana Gross Income Tax Act, section 14 (Appendix A, *post*, p. 21), permitting the taxpayer to sue for refund, provides:

> "In such petition, he shall set forth the amounts which he claims should be refunded, and the reasons for such claim."

and as to suits for refund that:

> "* * * no court shall entertain such a suit, unless the taxpayer shall show that he has filed a petition for refund with the department as hereinabove provided, * * *."

Suits for refund under the above section, including the present action, are suits against the State of Indiana in its sovereign capacity, although in form they appear to be suits against a department of the State. *Shoemaker v. Board of Commissioners* (1871), 36 Ind. 175, 186. The State cannot be sued without its consent and if terms are imposed by the statute giving consent, plaintiff must bring himself within such terms. *State of Indiana v. Mutual L. Ins. Co.* (1910), 175 Ind. 59, 71. The taxpayer seeking to recover from the State must strictly pursue the remedy granted. *Shoemaker v. Board of Commissioners* (1871), 36 Ind. 175, 188; *Maas & Waldstein Co. v. U. S.* (1930),

283 U. S. 583, 589; *Paul, Federal Estate and Gift Taxation* (1st ed., 1942), p. 915. The statutory requirement as to stating reason for refund cannot be waived although a similar provision when contained in an administrative regulation is subject to waiver. *U. S. v. Garbutt Oil Co.* (1938), 302 U. S. 528, 533. This act limits the power of the state's officers in granting refands and those dealing with such officers are charged with knowledge of such limitation of power. *State v. Tuesburg Land Co.* (1915), 61 Ind. App. 555.

With these principles in mind we tura to the facts of this case. While the court below held that the claims for refund filed by the petitioner was in proper form (R. 68) the court at the same time specifically stated the grounds urged in the claim for refund (R. 66). These two findings must be read together and they establish the fact that as to Class A sales the claim for refund stated three reasons for non-liability. The first and third concerned interstate commerce and the statute of limitations, respectively, and the second claimed a refund for the reason "that the receipts were from transactions completed outside of the State and were not taxable under Section 1 (m) of the Gross Income Tax Act as amended, nor under regulations 191 and 193 under the 1933 Act, and further, if such receipts were taxable, then the Act was in conflict with the Fourteenth Amendment to the Constitution of the United States" (66).

Section 1 (m) of the Gross Income Tax Act of 1937 and Regulations 191 and 193 under the 1933 Act are contained in Appendix A at pages 29 to 31 of petitioner's brief. Such Section 1 (m) concerns only Indiana corporations and residents having gross receipts from a trade or business situ-

ated and regularly carried on at legal situs outside the state while in the case at bar petitioner urges as error that the decision of the court below misconstrued the decisions of the Indiana Supreme Court relating to Section 2 of the Act, which concerns the source of the receipts of non-resident corporations.

It has been expressly held that the tax levied by Section 2 against non-residents is distinct and different from the tax levied by Section 2 upon residents. *Department of Treasury v. Wood Preserving Company* (1941), 313 U.S. 62, reversing 114 Fed. (2d) 922, which held to the contrary. Regulations 191 and 193 also mentioned in the claim for refund are concerned with the right of the State of Indiana to levy a tax upon activities carried on by residents entirely without the State of Indiana and not with the question as to whether Indiana actually did levy a tax under Section 2 which was the question decided in the case of *Department of Treasury v. International Harvester Company* and which is the question which petitioner now seeks to present.

The statute in question clearly states that a condition precedent to this action is that plaintiff file a claim for refund *setting forth the reasons* for such claim. The record shows that the reasons set forth in the claim for refund are expressly based upon a different section of the statute than the reasons now urged and although the reasons are similar they are not identical. The audits of the Department under the two sections would set forth different figures and have a different approach.

Petitioner, not having stated the reasons it now urges, does not present a case against the State of Indiana, which

has not consented to be sued upon any other ground than that stated in the claim for refund.

In regard to specification of error number 3 upon the theory of account stated, the record clearly shows that the alleged account stated arose subsequent to the filing of this action (R. 68-77) this matter of an account stated was never at any time submitted to the Department as the reason for a refund, and the State has not given its consent to be sued upon that cause of action. There is no showing or semblance of a showing in the record that the petitioner has performed the statutory condition precedent by staing this claim in a petition for refund as a reason for such refund.

For the reasons so stated respondent urges that the specifications of error stated in the petition for the writ of certiorari were not properly presented to the trial court and cannot therefore be presented to this court.

B.

Under the law of Indiana the gross receipts of petitioner were received from a source within Indiana.

Under specifications 1 and 2 the petitioner argues that the decision of the court below is erroneous because the gross receipts were not received from a source within Indiana and that it is contrary to the decision in *Department of Treasury v. International Harvester Company* (1942), 47 N.E. (2d) 150.* The questions presented by these two specifications are so similar as to be best treated together for the part of the *Harvester* decision upon which

* A copy of this decision is set forth in Appendix C, *post*, p. 31. As to Class C, D & E Sales, it was affirmed May 15, 1944 (12 U. S. Law Week, 4367), — U. S. —.

petitioner relies concerns the question as to whether the particular receipts in that case were from a source within Indiana.

The *International Harvester Company* case concerns four distinct types of sales. Petitioner refers only to the Class A sales therein mentioned. A comparison of the facts involved in the four classes of sales shows that wherever the seller made delivery of the goods to the buyer in Indiana the court held that the receipts were received from a source within Indiana. This is best exemplified by Class D sales, for there the selling branch and purchaser, were non-residents of Indiana. The contract of sale was negotiated outside Indiana and the only act which occurred in Indiana was the delivery of merchandise. It was held that the source of the receipts was in Indiana.

Under its description of Class A sales (Appendix C, *post*, p. 31) the court expressly states that the shipment from the out-of-state seller to the purchaser was without the purchaser's direction. This Statement negatives the existence of any requirement in the contract of sale necessary to bring those sales within rule 5, § 19, of the Uniform Sales Act as adopted in Indiana (Burns' Ind. Stat., 1943 Replacement, 58-203, Rule 5, Appendix B, *post* p. 29). Such sales would not then be excepted from, but would be governed by Rule 4 (a) of such section and the property in the goods passed at the place of shipment. The converse of that situation is contained in Class E in the *International Harvester* case where the contracts required shipment into Indiana. This brought the sale under Rule 5 of such Section (Appendix B, p. 29) which provides that, where delivery to the buyer is so required, the property in the goods passes at the destination.

Thus, the true rule of the *International Harvester* case is that the source of the receipts from the sale of goods is at that place where the property in the goods passes to the buyer. Applying this rule to the case at bar, we are confronted with the facts that the contract between the parties expressly provides that: "Payment by dealer is to be in cash before delivery," (R. 44) and "Title to all company products until actually paid for by dealer shall be and remain in company;" (R. 45). These facts are very similar to those in *Gaar, Scott & Co. v. Fleshman* (1906), 38 Ind. App. 490, 77 N.E. 744, where the court held that the property in the goods did not pass until delivery to the buyer. Under the above rule in the *International Harvester* case these transactions are taxable.

The petitioner relies upon certain acts occurring in the performance of the contract as being conclusive of the fact that delivery occurred outside the State of Indiana. Each of these will be discussed as a separate element.

1. The dealer was to pay the freight. This was also an element in the case of *Gaar, Scott & Co. v. Fleshman* (1906), 38 Ind. App. 490, *supra*, where the court held that the property in the goods did not pass until they reached the purchaser.

2. The goods were shipped C.O.D. This element was also present in *Gaar, Scott & Co. v. Fleshman, supra.*

3. The goods were shipped F.O.B. Detroit, Michigan. This provision is under the clause of the contract headed "Prices and terms". (R. 44.) It could not operate as a designation of the place of delivery, as the manufacture of the goods was not completed until the goods were ready to leave the assembly plants at Chicago, Louisville and

Cincinnati. This clause pertained wholly to prices and not at all to delivery. Detroit was merely a basing point in a pricing system that avoided the necessity of specifically scheduling prices at each dealer's place of business.

Not only did the contract provide for the retention in the seller of possession and title but the petitioner actually exercised this right of ownership upon many occasions by diverting deliveries in the course of transit, (R. 57, par. n, 4.) Likewise, Petitioner permitted the dealers to refuse delivery (R. 57). Under all of these facts the court below correctly stated that the goods were delivered in Indiana by the petitioner and when the carrier collected the balance due upon the purchase price it collected it as the agent of the consignor, petitioner herein. The court further correctly held that where such delivery is made in Indiana the decision in *Department of Treasury v. International Harvester Company* (1943), 47 N.E. (2d) 150, compels a decision that the source of petitioner's receipts was in the State of Indiana.

No question is raised herein as to the power of the State of Indiana to tax nor as to any constitutional inhibitions against taxation of these receipts. The sole question is: Did Section 2 of the Indiana Gross Income Tax Law purport to tax petitioner's receipts in Class A sales? The decision of the Circuit Court of Appeals in the affirmative was required by *Department of Treasury v. International Harvester Company* (1943), 47 N.E. (2d) 150.

C.

The court below did not depart from the accepted and usual course of procedure so as to require the exercise of the supervisory power of this court.

Petitioner points to certain alleged inaccuracies in the opinion of the Circuit Court of Appeals and maintains that they are such grave mis-statements of the record as to require the exercise of the supervisory power of this court.

Petitioner's first complaint points out the statement by the court (R. 100) that the receipt of some orders took place in Indiana. Petitioner then calls attention to Finding No. 8 (R. 50) where it is stated that the orders are forwarded by the dealer to the branch of the company to which he is assigned. If this statement by the court below is applied only to the Class A sales it is in error, but the appeal to the Circuit Court concerned both Class A sales and Class B sales. In the Class B sales the order was sent to the Indianapolis branch (R. 64). In any event, the place where the order is given or directed is immaterial under a proper interpretation of *Department of Treasury v. International Harvester Company* (1943), 47 N. E. (2d) 150, which is the question before this court in regard to such statement.

Petitioner further complains that the Circuit Court of Appeals did not disclose in its opinion the further alleged fact that the goods were delivered to the dealer or the dealer's agent outside the state, citing (R. 52). The finding upon page 52 refers generally to the practices of the petitioner in all types of sales made by it. The Circuit Court of Appeals, having before it only Class A sales at the time of its decision, correctly referred to the findings of the

court upon pages 63-64 of the record dealing specifically with that class of sales (R. 99). This class of sales is restricted to those sales where payment was made to the truckaway company upon delivery in Indiana either in cash or by finance papers and no deliveries to the dealers outside the state are involved.

Throughout its Statement of Facts and brief the petitioner attempts to substitute for the court's specific findings directed particularly to the Class A sales certain general findings as to the petitioner's method of doing business in all types of sales. In its specific findings as to the procedure in Class A sales the trial court's attention was focused directly upon the facts concerning such sales. Such direct, specific facts should not be confused by reference to a generalization of all the diverse selling methods of a large business corporation and the statement of the Circuit Court of Appeals is not only correct but is compelled by the record and by the decisions herein cited.

D

No account was stated between the parties regarding the tax on Class A Sales.

The powers of all state officers in Indiana are limited to those powers expressly or impliedly conferred by law and all persons dealing with such officers must take notice of the source of such officers' authority. *Julian v. State* (1890), 122 Ind. 68, 73.

Any account stated must rest in contract and no contract with the state may arise unless the officer who made it had statutory authority for that purpose. Petitioner

cites no such statutory authority and a careful reading of the Indiana Gross Income Tax Act discloses none.

Although Mr. Marchino is denominated a "Hearing Judge" (R. 41), there is no provision in the Gross Income Tax Law or any other law which mentions such an office or grants any power to it. On the contrary, the entire administration of the Gross Income Tax Law is lodged in the "Department" and it is specifically required that all documents must be signed by the "Director" in order to constitute the official act of the Department (Burns' Ind. Stat., 1943 Replacement, Sec. 64-2628, Appendix D, P. 36 *Post*). The decision by Mr. Marchino was not signed by the Director (R. 71, g). It did not, therefore, constitute an official act of the Department but was merely advisory to the Director.

It must be apparent, therefore, that the said officers charged with having contracted the account stated had no authority to make such a contract. Any attempt to do so is void and of no effect.

An account stated (being an agreement between the parties to a current or running account—an assent to an account—that a certain amount is due one of the parties to the account) is not in this case demonstrable. At no time was such an agreement made.

At no time was there an assent to an account.

At no time was a certain amount represented as being due.

It may also be seriously questioned as to whether the taxing authorities had any jurisdiction over this matter at the time of the alleged statement of account with them. Petitioner's claim for refund had been denied and com-

plaint for refund was filed on June 7, 1939. All Acts concerning an account stated occurred after this date. After the filing of the action the jurisdiction was in the court. It can well be doubted that the Legislature intended that the administrative agency retain jurisdiction to hear and decide a matter after it had been properly submitted to a court for decision.

If it were to be conceded that the taxing officials had the power and jurisdiction to contract an account stated, yet, it should seem apparent that none was finally agreed upon. The basis of petitioner's alleged account stated is the letter of findings by Mr. Marchino dated March 1, 1941. This letter of findings related to drive-away sales entirely completed at an out-of-state location. For example, the letter of findings states: "Deliveries of the products desired by Indiana customers are made under conditions whereby the Ford Motor Car Company at the time of the delivery to the customers or the customers' authorized representatives, will be paid for the products, or appropriate financing will be arranged for by the customers or by their authorized agents." The letter of findings previously had stated that delivery to the customer was made out-of-state.

The sales in question, in Mr. Marchino's opinion, were those where the Indiana dealer paid for the car at the out-of-state branch and there took delivery. Under such circumstances the title and dominion there passed to the customer and the petitioner had no property in it when it came to Indiana. Such a finding regarding such sales does not in any manner constitute an agreement regarding the sales here in question, where payment was made on delivery in Indiana of goods then owned and under the dominion of petitioner (R. 64).

The letter of findings referred the file to the Refund Section (R. 75) and, upon audit being made, it was found that sales of the character mentioned in the letter of findings amounted to $10,267.45, and the tax paid upon this amount has been refunded to petitioner (R. 77, Finding Fourteen).

The most that can be said for petitioner's contention is that Mr. Marchino stated the law and referred the matter to an audit for further development of the facts and figures. Upon development of the facts by the audit, the Department paid according to the letter of findings and refused to pay upon those transactions which did not coincide with those described in the letter of findings.

In conclusion, there is no merit to petitioner's insistence that there was an account stated in this cause of action.

Respectfully submitted,

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APPENDIX A.

Indiana Gross Income Tax Act of 1933, as Amended.

11 Burns Indiana Statutes, (1943 Replacement), § 64-2614.

Sec. 14. (a) If any person considers that he has paid to the department for any year an amount which is in excess of the amount legally due from him for that year under the terms of this act, he may apply to the department, by verified petition in writing, at any time within three years after the payment for the annual period for which such alleged overpayment has been made, for a correction of the amount so paid by him to the department, and for a refund of the amount which he claims has been illegally collected and paid. In such petition, he shall set forth the amount which he claims should be refunded, and the reasons for such claim. The department shall promptly consider such petition, and may grant such refund, in whole or in part, or may wholly deny the same. If denied in whole or in part, the petitioner shall be forthwith notified of such action of the department, and of its grounds for such denial. The department may, in its discretion, grant the petitioner a further hearing with respect to such petition. Any person improperly charged with any tax provided for under the terms of this act, and required to pay the same, may recover any amount thus improperly collected, together with interest, in any proper action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected: Provided, however, That no court shall entertain such a suit, unless the taxpayer shall show that he

has filed a petition for refund with the department, as hereinabove provided, within one year prior to the institution of the action: Provided, further, That no such suit shall be entertained until the expiration of six months from the time of filing such petition for refund with the department, unless in the meantime, the department shall have notified the petitioner, in writing, of the denial of such petition. Any such petition shall be subject to the provisions of section 11 (b). In every such action, a copy of the complaint shall be served upon the department, with the summons, which summons shall be so served at least fifteen (15) days before the return date thereof. It shall not be necessary for any taxpayer to protest against the payment of the tax in order to maintain such suit. In any suit to recover taxes paid, or to collect taxes, imposed under the provisions of this act, the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

(b) Either party to such suit shall have the right to appeal, as now provided by law in civil cases. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the state auditor, upon receipt of a certified copy of such final judgment, to issue a warrant directed to the treasurer in favor of such taxpayer, to pay such judgment, interest and costs. It shall be the duty of the treasurer to honor such warrant and pay such judgment out of any funds in the state treasury not otherwise appropriated.

(c) It shall be the duty of the attorney-general to represent the department, and or the State of Indiana, in all legal matters or litigation, either criminal or civil, relat-

ing to the enforcement, construction, application and administration of this act, upon the order and under the direction of the department.

(d) No injunction to restrain or delay the collection of any tax claimed to be due under the provisions of this act shall be issued by any court, but in all cases in which, for any reason, it be claimed that any such tax about to be collected is wrongful or illegal in whole or in part, the remedy, except as otherwise expressly provided in this act, shall be by payment and action to recover such tax as provided in this section.

APPENDIX B.

Uniform Sales Act as adopted in Indiana

11 Burns' Ind. Stat. (1943 Replacement), Section 58-203.

Rules for ascertaining intention.—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. (1) When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

(2) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer:

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20 (§ 58-204). This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon. (Acts 1929, ch. 192, § 19, p. 628.)

APPENDIX C.

IN THE SUPREME COURT OF INDIANA

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and Constituting the Department of Treasury of the State of Indiana v. INTERNATIONAL HARVESTER COMPANY and INTERNATIONAL HARVESTER COMPANY OF AMERICA	Appealed from the Marion Superior Court Room Three

(March 19, 1943)

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by SHAKE, J.

The appellees sued to recover Gross Income Taxes paid to the State of Indiana during the years 1935 and 1936. It was stipulated at the trial that judgment for any amount found due should be in favor of the appellee, International Harvester Company, and that, for the purposes of the case, the appellees should be considered as one party.

The evidence disclosed, without conflict, that the appellees were corporations organized under the laws of other states but authorized to do business in Indiana. They were engaged in the manufacture of farm implements and in the sale of their products both at wholesale and retail. Manufacturing establishments were maintained at Richmond and

Fort Wayne, and selling branches at Indianapolis, Terre Haute, Fort Wayne, and Evansville in this state. There were also numerous manufacturing plants and sales branches in adjoining states and elsewhere. Each branch served assigned territory and in several instances parts of Indiana were within the exclusive jurisdiction of branch offices located without the state.

The trial court determined the tax liability of the appellees under four tactual situations, designated as Classes A, C, D, and E. The nature of these transactions may be stated as follows:

> *CLASS A*: Sales by branches located outside Indiana to dealers and users located in Indiana. These sales were made on orders solicited in Indiana by representatives of out-of-state branches, or upon mail orders sent from Indiana to out-of-state branches. The orders were accepted by the outside state branch offices and the purchase money paid to them. Without directions from the purchasers, the goods were shipped to them in Indiana from branches, warehouses, or factories located outside Indiana.
>
> *CLASS C*: Sales by branches located outside Indiana to dealers and users residing in Indiana. The orders were solicited in Indiana and the customers took delivery to themselves at the factories in Indiana to save time and expense of shipping.
>
> *CLASS D*: Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this state.

> *CLASS E*: Sales by branches located in Indiana to dealers and users residing in Indiana, in which goods were shipped from points outside Indiana to customers in Indiana, pursuant to contracts so providing.

The court below found that the appellees were entitled to a refund of taxes paid upon A, C, and D transactions, but not for those under Class E. By properly assigned errors and cross-errors each of these findings is challenged.

Much of the briefs were devoted to the subject of the interstate attributes of the transactions. We consider these discussions beside the issues. Interstate commerce is not to be exempted from this tax unless it is imposed in such a manner as to lead to the possibility of double or multiple burdens. The Supreme Court of the United States held in *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, 82 L. Ed. 1365, 58 S. Ct. 913, 117 A. L. R. 429, that this tax could not be imposed upon a domestic corporation with its principal office and place of business in this state, for gross income derived from the sale of its products to customers in other states. The court said that, "the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold, as well as those in which they are manufactured. Interstate commerce could thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." In *Department of Treasury v. Allied Mills, Inc.* (1942), Ind., 42 N. E. (2d) 34, we interpreted the Adams case as meaning that the tax may be levied by the buyer's state regardless of the incidental interstate nature of the transaction. This view was sustained by the Supreme Court. *Allied*

Mills, Inc., v. Department of Treasury (1943), — U. S. —, — L. Ed. —, — S. Ct. —.

Applying the above decisions to the case at bar, it seems clear that transactions under Classes C, D, and E are subject to our Gross Income Tax. Neither of these classes present a possibility of double taxation, since no other state could impose such a burden in view of the conclusions reached in the J. D. Adams case.

Class A presents a different problem. Section 2 of Ch. 50, Acts 1933, § 64-2602, Burns' 1933, § 15982, Baldwin's 1934, which was in force during 1935 and 1936, provided:

> "Such tax shall be levied upon the entire gross income of all residents of the state of Indiana, and upon the gross income derived from sources within the state of Indiana, of all persons and/or companies, including banks, who are not residents of the state of Indiana, but are engaged in business in this state, or who derived gross income from sources within this state, * * *."

It was beyond the power of the treasury department to broaden the tax base established by this statute by administrative regulations. In *Department of Treasury v. Muessel* (1941), 218 Ind. 250, 254, 32 N. E. (2d) 596, this court said:

> "Unless the transaction comes clearly within one of the provisions of this definition it cannot be taxed as gross income. It is a settled rule of statutory construction that statutes levying taxes are not to be extended by implications beyond the clear import of the language used, in order to enlarge their operation, so as to embrace transactions not specifically pointed out. In case of doubt such stat-

utes are to be construed more strongly against the state and in favor of the citizen."

The appellants would have us construe the statute as exempting only income derived *entirely from activities* outside of Indiana. This would distort the clear import of the language employed and violate the rule stated above. Under Class A the orders upon which the goods were sold were accepted outside the confines of Indiana, and payment was made to branches in other states. There was no showing of a tax evasion. We cannot say that income so received by the appellees was "derived from sources within the State of Indiana." Perhaps we should call attention to the fact that § 2 of the Gross Income Tax of 1933 has since been amended. Acts 1937, Ch. 117, § 2, p. 604, § 64-2602, Burns' 1933 (Supp.), § 15982, Baldwin's Supp. 1937.

The judgment is affirmed as to Class A and E transactions, and reversed as to Classes C and D. The Superior Court of Marion County, Room 3, will sustain the appellants' motion for a new trial and enter a judgment as indicated by this opinion. The costs are adjudged equally against the parties.

APPENDIX D.

Indiana Gross Income Tax Act of 1933, as Amended.

Burns' Indiana Statutes (1943 Replacement), Sec. 64-2628.

Sec. 28. The administration of this act is vested in and shall be exercised by the department of treasury, except as otherwise herein provided. Such administration shall be under the supervision of the director, and all notices, summons, warrants, waivers, demands, and other written documents except as otherwise provided in section 29, shall be signed by him, and when so signed shall be regarded as the official acts of the department. The enforcement of any of the provisions of this act in any court shall be under the direction of the department. The director may require the assistance of, and act through, the prosecuting attorney of any county, and may, with the assent of the governor, employ special counsel in any county to aid the prosecuting attorney, the compensation of whom shall be fixed by and paid only upon the approval of the governor; but the prosecuting attorney of any county shall receive no fees or compensation for services rendered in enforcing this act, in addition to the salary paid to such officer. The director, with the approval of the governor, may appoint, as needed, such counsel, agents, clerks, stenographers, and other employees as authorized by law, who shall serve under him, shall perform such duties as may be required, not inconsistent with this act, and are hereby authorized to act for the department as the director may prescribe and as provided herein. In case of violation of the provisions of this act, the department may decline to prosecute for the first offense, if, in the judgment of the director, such violation is not willful or flagrant.